FILE COPY

SUPREME COURT, U.S.
FILED
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 974

BANK VOOR HANDEL EN SCHEEPVAART, N.V.,

Petitioner,

v.

ROBERT F. KENNEDY, Attorney General of the United States, and Peter Campbell Brown, Administrator, Subversive Activities Control Board,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT L. KUNZIG,
500 Fifth Avenue,
New York 36, New York,

LAWLER, KUNZIG & MILLER,
Munsey Building,
Washington 4, D. C.,

Attorneys for Petitioner.

INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND TREATIES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS RELIED ON FOR THE GRANTING OF THE WRIT	7
1. If the lower courts' interpretation of § 9(a) is correct, the Trading With the Enemy Act violates the due process and just compensation guarantees of the United States Constitution, Fifth Amendment	8
2. The Trading With the Enemy Act, fairly construed, does not permanently disqualify petitioners, solely by reason of their Netherlands nationality during World War II, from judicial remedy under § 9(a) of the Act	10
3. The decision below is inconsistent with the mutual obligations of the United States and the Netherlands as a matter of treaty and international law	12
CONCLUSION	14
APPENDIX	15
1. Opinion of the Court of Appeals for the District of Columbia Circuit	15

PAGE

2. Judgment of the Court of Appeals for the District of Columbia Circuit 18

3. United States Constitution:
   Art. 1, Sec. 8, Cl. 11 19
   Fifth Amendment 20

4. Trading With the Enemy Act, 40 Stat. 11 (1917), as amended, 50 U. S. C. App. §1 *et seq.*:
   Section 9(a) 20
   Section 2 21
   Section 5 22
   Section 7(c) 22
   Section 32 22

5. Treaty of Friendship, Commerce and Navigation, between the United States and the Netherlands, 8 U. S. T. 2043, T. I. A. S. 3942 24

CITATIONS

Cases:

Bank Voor Handel En Scheepvaart N.V. v. *Administrator of Hungarian Property* [1954] A.C. 584, affirming *Bank Voor Handel* v. *Slatford* [1953] 1 Q.B. 248 7

Becker Steel Co. v. *Cummings*, 296 U. S. 74 (1935) 8, 9, 14

Clark v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947) 9, 11, 12, 13

Guessefeldt v. *McGrath*, 342 U. S. 308 (1952) 9, 12

H. P. Drewry v. *Onassis*, 188 Misc. 912, 69 N. Y. S. 2d 850 (Sup. Ct. N. Y. Co., 1947), aff'd 272 App. Div. 870, 72 N. Y. S. 2d 262 (1st Dept., 1947), motion for leave to appeal denied, 72 N. Y. S. 2d 680 (1947) 11

PAGE

Miller v. *United States*, 78 U. S. (11 Wall.) 268 (1870) 10

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287 (1920) 9

Russian Volunteer Fleet v. *U. S.*, 282 U. S. 481 (1931) 9

Schilling v. *Rogers*, 363 U. S. 666 (1960) 9

Silesian-American Corp. v. *Clark*, 332 U. S. 469 (1947) 9

Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. *Rogers*, 357 U. S. 197 (1958) 9

Standard Oil Co. v. *Clark*, 163 F. 2d 917 (2d Cir. 1947), cert. den. 333 U. S. 873 (1948) 13

State Corporation Commission of Kansas v. *Wichita Gas Co.*, 290 U. S. 561 (1934) 9

Stoehr v. *Wallace*, 255 U. S. 239 (1921) 9, 11

V/O Sovfracht v. *Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* [1943] A. C. 203 10

Constitution, Statutes and Rules:

U. S. Constitution

Art. 1, Sec. 8, Cl. 11 ..... 3, 11, 19

Fifth Amendment 3, 6, 8, 20

Trading With the Enemy Act, 40 Stat. 11 (1917), as amended, 50 U. S. C. App. §1 *et seq.*

Section 2 ..... 3, 4, 10, 21

Section 5 ..... 3, 4, 22

Section 7(c) 3, 4, 9, 22

Section 9(a) 3, 4, 5, 7, 8, 9, 10, 11, 13, 20

Section 32(a) 3, 5, 22

PAGE

Act of June 25, 1948, ch. 646, 62 Stat. 928, 28 U. S. C. §1254(1) 2

Act of June 25, 1948, ch. 646, 62 Stat. 929, as amended, 28 U. S. C. §1291 6

Act of July 11, 1919, 41 Stat. 35 12

Act of June 5, 1920, 41 Stat. 977 12

Act of March 8, 1946, 60 Stat. 50 12

Rule 54(b), Federal Rules of Civil Procedure 6

Treaty:

Treaty of Friendship, Commerce and Navigation, between the United States and the Netherlands, 8 U. S. T. 2043, T. I. A. S. 3942 ..... 4, 12, 24

Art. V. Par. 1 ..... 4, 13, 24

Art. VI. Par. 4 ..... 4, 13, 24

Art. VI. Par. 5 ..... 4, 13, 24

Treatise:

1 Oppenheim, International Law, 688 (8th ed. Lauterpacht, 1955) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

BANK VOOR HANDEL EN SCHEEPVAART, N.V. *et al.*,
Petitioners,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL of the UNITED STATES as SUCCESSOR to the ALIEN PROPERTY CUSTODIAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Your petitioners are four corporations of the Netherlands, namely, Bank Voor Handel En Scheepvaart N. V., N. V. Hollandsch-Amerikaansche Beleggings-Maatschappij (Holland-American Investment Corporation), N.V. Handelscompagnie Ruilverkeer, and N.V. Handels-En-Transport-Maatschappij "Vulcaan". The respondents are Robert F. Kennedy, Attorney General of the United States, as successor to the Alien Property Custodian, and Elizabeth R. Smith, Treasurer of the United States. Petitioners pray that a writ of certiorari be issued to review a judg-

ment of the United States Court of Appeals for the District of Columbia Circuit entered on February 23, 1961, affirming orders (JA* 48-51) of the District Court for the District of Columbia which dismissed, for lack of jurisdiction, the complaints of petitioners N.V. Hollandsch-Amerikaansche Beleggings-Maatschappij (Holland-American Investment Corporation), N.V. Handelscompagnie Ruilverkeer, and N.V. Handels-En-Transport-Maatschappij "Vulcaan", and struck, for lack of jurisdiction, certain claims from the complaint of petitioner Bank Voor Handel En Scheepvaart, N.V.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia Circuit (Appendix hereto, pp. 15-17) has not yet been reported. The District Court rendered no opinion.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on February 23, 1961. A copy thereof appears at pages 18, 19 of the Appendix hereto. The jurisdiction of this Court is invoked under Act of June 25, 1948, ch. 646, 62 Stat. 928, 28 U. S. C. § 1254 (1).

Questions Presented

The basic issue is whether petitioners, solely because they were corporations of the Netherlands when the Netherlands was occupied by German military forces during World War II, are permanently barred from any judicial

* Joint Appendix in the Court of Appeals.

remedy to recover their property seized by the Alien Property Custodian.

This issue presents three questions:

1. Does the Trading with the Enemy Act violate the due process and just compensation guarantees of the United States Constitution, Fifth Amendment, if the Act is construed to deny permanently to petitioners, solely because of their Netherlands nationality during World War II, any judicial hearing with respect to the taking and retention of their property without any compensation?

2. Does the Trading with the Enemy Act, properly construed, permanently disqualify petitioners, solely by reason of their Netherlands nationality during World War II, from any judicial remedy under § 9(a) of such Act for return of their vested property?

3. Under international law and the Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands, do petitioners, as Netherlands nationals, have the same standing after World War II as United States nationals have, to sue in the district court for return of vested property?

Constitutional Provisions, Treaties and Statutes Involved

The constitutional provisions, treaties and statutes here involved are:

1. U.S. Constitution, Fifth Amendment, and Article I, Sec. 8, Cl. 11.

2. Trading with the Enemy Act, 40 Stat. 411 (1917) as amended, 50 U.S.C. App. §§ 2, 5, 7(c), 9(a) and 32(a).

3. Treaty of Friendship, Commerce and Navigation with the Netherlands, effective December 5, 1957, Art. V, par. 1, Art. VI, pars. 4, 5, 8 U.S.T. 2043, T.I.A.S. 3492.

The relevant provisions of the foregoing are set forth at pages 19-24 of the Appendix hereto. We summarize the relevant provisions of the Trading with the Enemy Act (hereinafter sometimes called the "Act") as follows:

Section 5 of the Act grants broad powers to the President or his designee to vest property of any foreign country or "national thereof".

Section 9(a) of the Act pursuant to which these actions were brought, provides that any person "not an enemy or ally of enemy" may sue the Alien Property Custodian or the Treasurer of the United States in the United States District Court for the District of Columbia for the return of vested property and is entitled to return if he establishes his rights of ownership to the satisfaction of the Court.

Section 2 of the Act defines an "enemy", and includes in such definition

> "Any individual * * * resident within the territory (*including that occupied by the military and naval forces*) of any nation with which the United States is at war * * * and any corporation incorporated within such territory of any nation with which the United States is at war * * *" (Italics supplied.)

Section 7(c) of the Act provides that the sole remedy of any person claiming vested property shall be that provided by the Act.

Section 32(a), enacted in 1946 and thereafter expanded by amendment, authorizes the President or his designee, by administrative action, to return any vested property upon a determination that the claimant is not excluded, under prescribed conditions.

Statement of the Case

Petitioners are corporations organized under the law of the Netherlands. They include a commercial bank, shipping company and trading company, all of which existed and did business prior to the outbreak of World War II (JA 54). In 1942 the Alien Property Custodian vested petitioners' property having a value of over $4,000,000. (JA 3, 10, 16, 22).

In 1949, petitioners brought separate actions in the United States District Court for the District of Columbia for the return of their vested property. Jurisdiction of that Court rested on §9(a) of the Trading with the Enemy Act. Although the Court of Appeals in its opinion (Appendix hereto, p. 16) stated that the complaints herein were filed after petitioners failed to recover their property in an administrative proceeding, it is clear that the complaints herein were filed in 1949 long before conclusion of the administrative proceeding and that defendants' time to answer the complaints was by stipulation extended until sixty days after final disposition of the claims on an administrative basis (JA 25-28).

Each of the complaints (JA 2-25) alleges in substance that the plaintiff is a Netherlands corporation, that its property has been vested by the defendants, that plaintiff is not an enemy or ally of an enemy within the meaning of the Trading with the Enemy Act, that it never engaged in activities inimical to the United States and never acted as a cloak for an enemy, that a notice of claim for return

of its property was duly filed, that notwithstanding plaintiff's eligibility for return of its property the defendants have refused return and that plaintiff has been deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The four actions here involved were consolidated for trial with two other similar actions, one by another Netherlands corporation and the other by a Swiss foundation (JA 46). Thereafter, the defendants moved to dismiss the complaints of the five Netherlands corporations (omitting the Swiss foundation) on the ground that the Court lacked jurisdiction of the subject matter of such actions solely because the Netherlands plaintiffs "were at all material times corporations incorporated in the Netherlands while the Netherlands were occupied by Germany and Germany was at war with the United States in the Second World War" (JA 47, 48).

Defendants withdrew so much of their motion as related to claims to return of property vested after the liberation of the Netherlands (JA 54). Thus, the motion was completely withdrawn as to one defendant, became a motion to strike some of the claims of petitioner Bank Voor Handel En Scheepvaart N.V. and continued as a motion to dismiss the entire complaints of the other three petitioners (JA 54).

The District Court granted the defendants' motion to dismiss without opinion. The appellate jurisdiction of the Court of Appeals was invoked under Act of June 25, 1948, ch. 646, §2, 28 Stat. 929, as amended, U. S. C. §1291, and Rule 54(b) of the Federal Rules of Civil Procedure.

According to the vesting orders, the property was vested in 1942 on the basis that the Alien Property Custodian had found that the property was owned or controlled by nationals of designated enemy countries, namely

Germany and or Hungary, and had further determined that to the extent such nationals were not in such designated enemy countries the national interest of the United States required that they be treated as nationals of such designated enemy countries (JA 55-62). Petitioners' property was not vested, as the Court of Appeals said in its opinion (Appendix hereto, p. 16) "Because their country was occupied by the enemy".

By these actions petitioners seek an opportunity to establish to a Court that in fact they were never owned or controlled by an enemy within the meaning of §9(a). The rulings below deny such opportunity to be heard on the merits, not because of the alleged German or Hungarian nationality on the basis of which their property was vested as set forth in the vesting orders, but solely because of Netherlands nationality.

The English Courts have found that petitioner Bank Voor Handel En Scheepvaart N.V. was not an "enemy" for purposes of return of property under the British Trading with the Enemy Act. *Bank Voor Handel En Scheepvaart N.V. v. Administrator of Hungarian Property* [1954] A. C. 584, affirming *Bank Voor Handel En Scheepvaart N.V. v. Slatford* [1953] 1 Q. B. 248.

The Government of the Kingdom of the Netherlands, through its Ambassador, appeared in each court below as *amicus curiae* in support of petitioners' position that Netherlands nationality is not "enemy" nationality within the meaning of §9(a) of the Act for purposes of peacetime return of vested property.

Reasons Relied on for the Granting of the Writ

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The issue of law here presented has not been squarely raised or decided in any prior case and is far reaching in impact. Domestically, it is of fundamental importance to the proper administration of the Trading With the Enemy Act. Internationally, it raises serious questions as to the mutual protection to be afforded property rights of Netherlands (and other friendly) nationals and United States nationals in the territory of the other.

1. If the lower courts' interpretation of § 9(a) is correct, the Trading With the Enemy Act violates the due process and just compensation guarantees of the United States Constitution, Fifth Amendment.

Section 9(a) was included in the Act to avoid unlawful confiscation and thereby to insure the Act's constitutionality. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79 (1935). Although the Court below did not discuss the point, it tacitly accepted defendants' argument that petitioners can have no constitutional rights since they are enemies by definition and since the Constitution does not protect enemies. There is no basis in reason or precedent for holding that an "enemy" solely by reason of occupation is the equivalent of a true enemy insofar as the protection of the Fifth Amendment is concerned.

To sustain the judgment of the lower Court it appears that one of two untenable propositions must be sanctioned. Either it must be decided that petitioners, solely by reason of their existence as corporations organized under Netherlands law, are not entitled to the protection of the United States Constitution, or it must be decided that although petitioners, as nationals of a friendly foreign country are entitled to the protection of the United States Constitution, the Constitution fails to guarantee them the right to a judicial hearing concerning the seizure of their property. The first alternative is in conflict with the cases

holding that nationals of Russia and Switzerland are entitled to the protection of the United States Constitution. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931); *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (1947); *Societe Internationale Pour Participation Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197 (1958). The second alternative is in conflict with the cases holding that one entitled to the protection of the Constitution is entitled to a judicial hearing under §9(a) of the Act with respect to seized property. *Stochr* v. *Wallace*, 255 U.S. 239 (1921); *Becker Steel Co.* v. *Cummings*, 296 U.S. 74 (1935); *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952); *Societe Internationale Pour Participation Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197 (1958); cf. *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287 (1920); *State Corporation Commission of Kansas* v. *Wichita Gas Co.*, 290 U.S. 561 (1934). Not only is such choice of alternatives not compelled, but a fair reading of the Trading with the Enemy Act, such as this Court has prescribed in *Clark* v. *Uebersee Finanz Korporation*, 332 U.S. 480 (1947) and *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952), must result in the conclusion that nationals of friendly but enemy-occupied states are not, and were not intended by Congress to be, denied permanently the right to a judicial hearing with respect to administrative confiscatory action pursuant to war powers. The only judicial remedy available lies in original suit under §9(a), since there is no right to judicial review of an administrative refusal to return (*Schilling* v. *Rogers*, 363 U. S. 666 (1960)), and since §7(c) of the Act provides that the sole remedy of any person claiming vested property is that provided by the Act.

2. The Trading With the Enemy Act, fairly construed, does not permanently disqualify petitioners, solely by reason of their Netherlands nationality during World War II, from judicial remedy under § 9(a) of the Act.

There is no basis for inferring that Congress ever intended that after the liberation of his country a national of our wartime ally should continue because of his nationality to bear the burdens of "enemy" classification. This is clear when the intent of Congress is related to the purpose underlying the inclusion of a national of a wartime ally in the §2 definition of "enemy".

The purpose of such inclusion in §2 is to make it more difficult for the true enemy to further his war effort by exercising control over assets belonging to nationals of friendly but occupied countries. Such inclusion is based on the traditional principle that seizure is warranted of "any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner". See *Miller* v. *United States*, 78 U. S. (11 Wall.) 268, 306 (1870). The House of Lords has stated of similar English legislation that a Netherlands subject is "deemed to be an enemy • • • while the occupation continues" and "The reason is that, while the occupation lasts, they are on the wrong side of the line of hostile demarcation". See *V/O Sovfracht* v. *Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* [1943] A.C. 203, 219, 230.

Once property of a Netherlands national ceased in 1945 to be subject to true enemy control all reason ceased for continuing to regard the owner of such property as "enemy" solely by reason of Netherlands nationality.

In an analogous situation involving the right of a French national to sue on a private contract, the New York courts expressly distinguished between the French national's status during the war and his status after the war, and ruled that after liberation a French national "was no longer an enemy within the meaning of the Trading with the Enemy Act". See *H. P. Drewry* v. *Onassis*, 188 Misc. 912, 913, 69 N. Y. S. 2d 850, 851 (Sup. Ct. N. Y. Co., 1947), aff'd 272 App. Div. 870, 72 N. Y. S. 2d 262 (1st Dept. 1947), motion for leave to appeal denied, 72 N. Y. S. 2d 680.

The Act, which is "strictly a war measure and finds its sanction in the constitutional provision, Art. I, §8, cl. 11, empowering Congress 'to declare war, grant letters of marque and reprisal, and makes rules concerning captures on land and water'" (*Stoehr* v. *Wallace*, 255 U.S. 239, 242 (1921)), should not be interpreted in such a way as to produce a result not legitimately related to the constitutional war powers granted to Congress. Although the war powers clause may justify the vesting in wartime of property owned by a national of an allied but enemy-occupied country, the permanent confiscation in peacetime of such property solely because of Netherlands nationality, is totally unrelated to any legitimate aim of war or of peacetime settlement. This Court has found "not the slightest suggestion that Congress was concerned under this Act with property owned or controlled by friendly or neutral powers and in no way utilized by the Axis". See *Clark* v. *Uebersee Finanz-Körporation*, 332 U. S. 480, 487 (1947).

A national of Switzerland, a wartime neutral, and even a German national resident in Hawaii, is entitled to a judicial hearing under §9(a) as to whether he is in fact

an enemy. *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947); *Guessefeldt* v. *McGrath*, 342 U. S. 308 (1952). Congress could not have intended discrimination against a national of the Netherlands, a wartime ally, solely by reason of nationality.

The history of the Act shows that the situation of the "technical enemy"—one who fits the definition of enemy because of temporary occupation of his country by forces of the real enemy—was considered after both World War I and World War II, and that amendments to the Act were passed to clarify the authority of the Alien Property Custodian to make summary *administrative* returns to technical enemies and others, including persecuted persons. Act of July 11, 1919, 41 Stat. 35; Act of June 5, 1920, 41 Stat. 977; Act of March 8, 1946, 60 Stat. 50, adding §32(a) to the Trading With the Enemy Act, 50 U.S.C. App. §32(a). Because of these amendments and because generally the Alien Property Custodian in carrying out voluntary administrative returns acted in a manner as to distinguish between real and technical enemies, the courts have not been called on until now to pass on the issue here involved. These amendments dealing with administrative returns were never intended to affect the judicial remedy for return which was part of the Act when originally passed in 1917.

3. The decision below is inconsistent with the mutual obligations of the United States and the Netherlands as a matter of treaty and international law.

Effective December 5, 1957, the United States and the Netherlands entered into a Treaty of Friendship, Commerce and Navigation, reaffirming the rights and obligations of each country to the other. 8 U.S.T. 2043, T.I.A.S. 3942.

Article V, Paragraph 1 of the treaty (Appendix hereto, p. 24) affirms the right of each party to "national treatment with respect to access to the courts of justice" of the other party. A United States corporation, regardless of possible activity in an enemy country, has the right to bring suit under §9(a) to recover its property. See *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 925 (2d Cir. 1947), *cert. den.* 333 U. S. 873 (1948). Thus, the treaty principle requiring "national treatment with respect to access to the courts of justice" can be given effect in our situation only if §9(a) is open to Netherlands corporations as it is to United States corporations. Apart from the treaty, it is a fundamental principle of international law that in peace time "every State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned." 1 Oppenheim, International Law, 688 (8th ed. Lauterpacht, 1955).

Moreover, Paragraph 4 of Article VI of the treaty (Appendix hereto, p. 24) provides that Netherlands property shall not be taken in the United States except for a public interest and only with "prompt payment of just compensation". As to these "just compensation" benefits, Paragraph 5 of such Article VI (Appendix hereto, p. 24) provides that Netherlands nationals shall receive not only "national treatment" but also "most-favored-nation treatment". Since a Swiss corporation is accorded judicial remedy under §9(a) (*Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947)), it is contrary to the "most-favored-nation treatment" principle of the treaty to deny equal judicial benefit to a Netherlands corporation simply by reason of being incorporated in the Netherlands.

Conclusion

Instead of construing §9(a) broadly "to give effect to its remedial purpose" (*Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 80 (1935)), the courts below have given §9(a) a narrow and inflexible interpretation which for the first time determines that Netherlands nationality is "enemy" in time of peace. Grave doubts as to the constitutionality of the Act are thereby raised, unnecessarily so. Nothing in the text of the Act requires such interpretation. On the contrary, a fair reading of the Act, particularly in terms of its purpose, compels the conclusion that Congress never intended to make the nationality of allies, after cessation of German occupation, a bar to judicial remedy for recovery of property seized in wartime pursuant to war powers. Moreover, due regard for treaty principles and international law requires that the judicial remedy open under §9(a) to nationals of the United States and of wartime neutral countries should also be available to Netherlands nationals.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. AUGENBLICK,
500 Fifth Avenue,
New York 36, N. Y.

LAWRENCE C. MOORE,
Mills Building,
Washington 6, D. C.,
Attorneys for Petitioners.

May 1961.

APPENDIX

1. Opinion of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15932

BANK VOOR HANDEL EN SCHEEPVAART, N.V., APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

No. 15933

N.V. HOLLANDSCH-AMERIKAANSCHE BELEGGINGS-MAATSCHAPPIJ
(Holland-American Investment Corporation)
APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

No. 15934

N.V. HANDELSCOMPAGNIE RUILVERKEER, APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

No. 15935

N.V. HANDELS-EN-TRANSPORT-MAATSCHAPPIJ, "VULCAAN", APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

Decided February 23, 1961

Mr. Robert L. Augenblick, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Lawrence C. Moore* was on the brief, for appellants.

Mr. Arthur R. Schor, Attorney, Department of Justice, with whom *Miss M. Magdalena Schoch*, Attorney, Department of Justice, was on the brief, for appellees.

Mr. Walter A. Slowinski filed a brief on behalf of J. H. van Roijen, Ambassador Plenipoteniary, Kingdom of the Netherlands, as *amicus curiae*, urging reversal.

Before EDGERTON, PRETTYMAN and FAHY, *Circuit Judges*.

PER CURIAM: Because their country was occupied by the enemy, property of appellant Netherlands corporations was vested during World War II under §5 of the Trading with the Enemy Act. 40 STAT. 411, 415, as amended, 50 U.S.C. App. §5. After failing to recover the property in an administrative proceeding, appellants filed complaints demanding its return. The District Court dismissed the complaints for lack of jurisdiction.

By §9(a) of the Trading with the Enemy Act "any person not an enemy or ally of enemy" who claims an interest in vested property and fails to recover it by administrative action may sue to establish his claim. By §2 of the Act "enemy" means "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

This definition covers appellants and therefore §9(a) gives them no right to sue. "The only express provision in the Trading with the Enemy Act for recourse to the courts by those claiming the return of property vested during World War II is that contained in §9(a)." *Schilling* v. *Rogers*, 363 U. S. 666, 671. Here, as in *Schilling*, no implied provision covers the case. By §7(c) of the Act the sole remedy of any person claiming vested property is "that provided by the terms of this Act." This is a suit against the United States to which the United States has not consented.

The treaty of 1957 between the Netherlands and the United States assures Netherlands nationals full access to United States courts but does not waive sovereign immunity, mention the Trading with the Enemy Act, or create causes of action which Congress has refused to create.

Affirmed.

2. Judgment of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM—1960

Civil 1942-49

No. 15,932

BANK VOOR HANDEL EN SCHEEPVAART, N.V., APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Civil 1941-49

No. 15,933

N.V. HOLLANDSCH-AMERIKAANSCHE BELEGGINGS-MAATSCHAPPIJ
(Holland-American Investment Corporation)
APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Civil 1938-49

No. 15934.

N.V. HANDELSCOMPAGNIE RUILVERKEER, APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Civil 1937-49

No. 15935

N.V. HANDELS-EN-TRANSPORT-MAATSCHAPPIJ, "VULCAAN", APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

Before: Edgerton, Prettyman, and Fahy, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the District Court appealed from in these cases are affirmed.

Per Curiam.

Dated: February 23, 1961.

3. United States Constitution

Art. 1, Sec. 8, Cl. 11

The Congress shall have Power • • • To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Fifth Amendment

No person shall be held * * * nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. Trading With the Enemy Act, 40 Stat. 411 et seq., as amended, 50 U. S. C. App. §1 et. seq.

Section 9

"§9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled * * * If the President shall not so order within sixty days after the filing of such application or if the claimant shall have

filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled • • •"

Section 2

"§2. Definitions

"The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act [section 1-6 and 7-39 of this Appendix]—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory • • •"

Section 5

"* * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President * * *"

Section 7(c)

"* * * The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed * * * to the Alien Property Custodian * * * or seized by him shall be that provided by the terms of this Act * * *"

Section 32

"§32. Return of property—(a) Conditions precedent

"The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, * * *

(2) that such owner, and legal representative or successor in interest, if any, are not—

(A) the Government of Germany, Japan, Bulgaria, Hungary, or Roumania; or

(B) a corporation or association organized under the laws of such nation; * * * or

(C) an individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the United States or a diplomatic or consular officer of Italy or of any nation with which the United States has not at any time since December 7, 1941, been at war: Provided, That an individual who, while in the territory of a nation with which the United States has at any time since December 7, 1941, been at war, was deprived of life or substantially deprived of liberty pursuant to any law, decree, or regulation of such nation discriminating against political, racial, or religious groups, shall not be deemed to have voluntarily resided in such territory; or

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Roumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946], was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: Provided, That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: * * * or

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under

subdivisions (A), (B), (C), or (D) hereof: Provided, That notwithstanding the provisions of this subdivision (E), return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section [March 8, 1946] • • •"

5. Treaty of "Friendship, Commerce and Navigation" between United States and the Netherlands, effective December 5, 1957, 8 U.S.T. 2043, T.I.A.S. 3942

Article V, Par. 1

"1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. • • •"

Article VI, Pars. 4 and 5

"4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public interest, nor shall it be taken without the prompt payment of just compensation • • •"

"5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. • • •"

F

Supreme Court of the United States

TABLE OF CONTENTS

	PAGE
STATEMENT	1
THE INTEREST OF THE *Amicus Curiae*	2
REASONS FOR GRANTING THE WRIT	3
1. The definition of enemy accepted by the court below runs counter to internationally accepted notions of enemy status and alliance	3
2. The definition of enemy accepted by the court below results in discrimination because of nationality	5
3. The definition of enemy accepted by the court below in effect subjects all property of enemy occupied states to seizure and retention by administrative fiat	8
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

Anderson v. *N. V. Transandine Handelmaatschappij*, 289 N. Y. 9, 43 N. E. 2d 502 (1942)	4
Becker Steel Co. of America v. *Cummings*, 296 U. S. 74 (1935)	7
Clark v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480 (1947)	5, 6
Schilling v. *Rogers*, 363 U. S. 666 (1960)	7

PAGE

Société Internationale Pour Participations Industrielles et Commerciales, S. A. v. *Rogers*, 357 U. S. 197 (1958) 6

Sovfracht (V/O) v. *Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] A. C. 203 4

Standard Oil Co. v. *Clark*, 163 F. 2d 917 (2d Cir. 1947), cert. denied, 333 U. S. 873 (1948) 5

Stoehr v. *Wallace*, 255 U. S. 239 (1921) 7

Zalcmanis v. *United States*, 173 F. Supp. 355 (Ct. Cl. 1959), cert. denied, 362 U. S. 917 (1960) 7

TREATY AND STATUTE

Trading With The Enemy Act, 40 Stat. 411 (1917), 50 U. S. C. App. 1 et seq. 3, 5, 7

Sec. 9(a) 7

Treaty of Friendship, Commerce and Navigation With the Netherlands, March 27, 1956 [1957], 8 U. S. T. & O. I. A. 2043, T. I. A. S. 3942 ..... 5, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

BANK VOOR HANDEL EN SCHEEPVAART, N.V., et al.,
Petitioners,

—against—

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, and ELIZABETH R. SMITH, Treasurer of the United States,
Respondents.

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF J. H. VAN ROIJEN, *AMICUS CURIAE*

STATEMENT

This case arose as the result of seizure and refusal to return by the United States Alien Property Custodian and his successor, the Attorney General, of assets in the United States belonging to petitioners. The petitioners, four Netherlands corporations, have sought to challenge in the United States courts the right of the said United States officials to seize and retain their property, but have been turned back thus far "because," in the words of the Court of Appeals, "their country was occupied by the enemy

[Germany]." The details of the litigation are adequately stated in the petition for writ of certiorari filed on behalf of petitioners. In short, petitioners seek to establish that they are not disqualified solely because of Netherlands nationality from access to the courts of the United States on the issue of confiscation of their property.

THE INTEREST OF THE *AMICUS CURIAE*

In filing the present memorandum in support of the petition for certiorari, the Netherlands Government is fulfilling one of its traditional functions, supporting the interests of its nationals engaged in business abroad. The petitioners here have for over forty years been important members of the Netherlands business community, and continue to be active in banking, shipping, and heavy industry in the Netherlands. Petitioners are, however, well represented by counsel, and were this case limited to a single claim, however large or meritorious, the Netherlands Government would not feel compelled to take the extraordinary step of appearing as *amicus curiae* in a United States court.

The present case, in the view of the Netherlands Government, has implications beyond those of a single claim, and the urgency of having these implications recognized, and of correcting the result of the lower court's decision before it becomes a precedent, has caused the Netherlands Government to seek to place its views directly before this Court.

1. The effect of the decision below is that any Netherlands national, whether a natural or juristic person, is treated as an enemy 15 years after the close of hostilities.

2. The effect of the decision below is that a corporation organized in the Netherlands is treated differently in the courts of the United States from a corporation organized

in the United States, and indeed from a corporation organized, for example, in Switzerland.

3. The effect of the decision below is that Netherlands nationals can be deprived of their property by administrative fiat, not just temporarily in an emergency, but permanently.

It requires no elaboration to see that the Netherlands, proud of its reputation as a guardian of private property and foreign investments, anxious to uphold its alliance with the United States against criticism both at home and abroad, and constant in its opposition to Hitler Germany and all other forms of totalitarianism, has a strong interest in correcting the decision in this case. The Netherlands Government is hopeful that the necessary review and correction of the decision in this case can be accomplished by this Court, without further proceedings on an international level.

REASONS FOR GRANTING THE WRIT

Without addressing itself to the questions of statutory, constitutional, and international law discussed in the petition for certiorari filed on behalf of the petitioners, this memorandum seeks only to indicate the kind of argument to be made against the results mentioned above.

1. The Definition of Enemy Accepted by the Court Below Runs Counter to Internationally Accepted Notions of Enemy Status and Alliance.

The court below read the definition of enemy in the Trading with the Enemy Act to include for all time one who was in territory even temporarily occupied by the forces of the enemy. While such definition of enemy may well have been justified for purposes of vesting or block-

ing assets in time of war, as a permanent definition it runs counter to any intelligent distinction between victim of occupation and real enemy.

The common struggle of the Netherlands with the United States against the German and Japanese enemy requires no documentation here. It may be noted however that two eminent courts, the British House of Lords and the New York Court of Appeals, had occasion even while hostilities were in progress to speak of the status of the Netherlands. The House of Lords, in 1943, spoke of

> a natural repugnance to describing as enemies of this country those loyal and patriotic subjects of Holland who have had the misfortune to be forced to reside there after the German occupation. . .
>
> *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] A. C. 203, 218.

While the court was compelled to agree that during wartime a Netherlands corporation was barred under the British Trading with the Enemy Act from suing in the British courts, the court made it clear that this disability, and this enemy status, lasted only as long as the occupation by the enemy:

> The reason is that, while the occupation lasts, they [plaintiffs] are on the wrong side of the line of hostile demarcation . . . (*Id.* at 230).

The New York Court of Appeals, in 1942, upheld emergency wartime legislation of the Netherlands on the basis that the "enemy [of the Netherlands] is now our enemy," and that legislation of the Netherlands is "part of the law of a friendly foreign State." *Anderson* v. *N. V. Transandine Handelmaatschappij*, 289 N. Y. 9, 19, 43 N. E. 2d 502, 506, 507 (1942).

When the Netherlands and the United States concluded their Treaty of Friendship, Commerce and Navigation in 1957, based, as is said in the Preamble, on the desire of the two countries to strengthen "the bonds of peace and friendship traditionally existing between them," it surely occurred to no one that being a national of one of the parties could have the effect in the law of the other party of endowing such national with the status of enemy. Treaty of Friendship, Commerce and Navigation With the Netherlands, March 27, 1956 [1957], 8 U. S. T. & O. I. A. 2043, T. I. A. S. 3942.

It is not contended, of course, that Netherlands nationality is conclusive assurance that a person or corporation is not an enemy. All of the allied nations have had the experience with the various devices used by Germany and Japan to "cloak" their activities in the garb of neutral or allied nationality. See *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 484-85 (1947). The contention is simply that Netherlands nationality or incorporation cannot be the one factor giving to an alien in the United States the status of enemy.

2. The Definition of Enemy Accepted by the Court Below Results in Discrimination Because of Nationality.

It is clear that a corporation organized in one of the States of the United States may bring an action in the courts under the Trading with the Enemy Act to challenge a determination by the Alien Property Custodian that it is an enemy within the meaning of the Act on account of doing business with the enemy. *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 925 (2d Cir. 1947), cert. denied, 333 U. S. 873 (1948). Similarly, it is clear that a corporation organized in Switzerland may bring an action in the courts under the Trading with the Enemy Act to challenge a

determination by the Alien Property Custodian that it is an enemy within the meaning of the Act. *E.g., Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480 (1947); *Société Internationale Pour Participations Industrielles et Commerciales, S. A.* [*Interhandel*], v. *Rogers*, 357 U. S. 197 (1958). Indeed in this very case, one of the members of the Bank voor Handel en Scheepvaart group, owned by the same beneficial owners and operated by the same management as petitioners, has been permitted to maintain suit (Civ. Action No. 1939-49, D. D. C.), because the country under whose laws it was created is not the Netherlands. Only the Netherlands companies have been barred from suit, and, according to the judgment below, solely because their country was occupied by the enemy during World War II.

The court below has stated that the Treaty of 1957 between the Netherlands and the United States assures Netherlands nationals full access to United States courts. This is clear from Article V(1) of the Treaty, reading as follows:

> Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.
>
> Treaty of Friendship, Commerce and Navigation With the Netherlands, March 27, 1956 [1957], 8 U. S. T. & O. I. A. 2043, T. I. A. S. 3942.

But if access to courts and national treatment are to mean only that Netherlands nationals are privileged to be told in

court that their nationality disqualifies them from receiving a hearing on the merits, the protection afforded by the Treaty, and indeed by international law in general, is reduced to mockery.

The court below stated that the Treaty of 1957 makes no reference to the Trading with the Enemy Act, does not waive sovereign immunity, and creates no new causes of action. But if discrimination is to be guarded against by treaty, it is obvious that no single statute passed by one treaty partner—whether before or after the treaty—can undo the general renunciation of discrimination by both parties. As for sovereign immunity, the United States has already consented, in § 9(a) of the Trading with the Enemy Act, to be sued for claims arising from seizures of property by the Alien Property Custodian, and all that petitioners assert is that this consent must under the Treaty apply to them as it does to United States nationals. See *Zalcmanis* v. *United States*, 173 F. Supp. 355 (Ct. Cl. 1959), cert. denied, 362 U. S. 917 (1960). As for the creation of new causes of action, petitioners have sought no other remedy than that provided by the Trading with the Enemy Act. *Cf. Schilling* v. *Rogers*, 363 U. S. 666 (1960). They contend simply that they are entitled to the same rights as are, and must be, granted to United States nationals under § 9(a) of the Trading with the Enemy Act. See *Stoehr* v. *Wallace*, 255 U. S. 239 (1921); *Becker Steel Co. of America* v. *Cummings*, 296 U. S. 74 (1935). If petitioners are excluded from these rights because they are corporations organized in the Netherlands, they are the victims of unlawful discrimination according to nationality.

3. The Definition of Enemy Accepted by the Court Below in Effect Subjects All Property of Enemy Occupied States to Seizure and Retention by Administrative Fiat.

As a result of the decision below in the present case, no national of a country occupied by the enemy in time of war can feel secure against arbitrary seizure and retention of its property in the United States. According to the decision below, any assets of Netherlands banks or insurance companies, or any Netherlands flag merchant ship, could have been seized by the United States enemy property authorities, and if the owner of such property had been a resident or national of the Netherlands during 1940-1945, or had been a corporation organized under Netherlands law, the only remedy of such owner would have been to appeal for voluntary return to the same Alien Property Custodian (or his successor) who had authorized the seizure of the property. It is plain that this prospect, never before thought of, must in view of the present world situation have an unsettling effect both on Netherlands commercial interests contemplating investment in the United States and on foreign commercial interests contemplating business relations with Netherlands enterprises.

CONCLUSION

The decision below is an important decision in the history of enemy property law. It cannot be allowed to stand as a precedent. The decision defines the word enemy to confuse oppressed and oppressor and to undermine the basis of alliance. It discriminates without real reason between nationals of the United States and neutral nations, and nationals of occupied nations, in violation of international law and treaty. Finally, the decision below undermines the security of foreign private property and invest-

ment, which has been one of the cornerstones of United States law and policy.

For the reasons stated, the petition for writ of certiorari in this case should be granted.

Respectfully submitted,

HENRY P. DE VRIES
Attorney for J. H. VAN ROIJEN
Ambassador Plenipotentiary,
Kingdom of the Netherlands
Amicus Curiae

ANDREAS F. LOWENFELD
Of Counsel